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PRINCIPLE OF EQUIVALENCE AND EFFECTIVENESS IN THE EUROPEAN UNION LAW

Abstract of the Doctoral Dissertation

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I. Background and aims of the research

The same national procedural rules should apply to the enforcement of rights derived from European Union law before the national courts or authorities as when enforcing the national law. There is no common civil or administrative procedural code in the EU which would be applicable in these cases. However, the Court of Justice of the European Union (hereinafter: CJEU) laid down the principles which should be taken into consideration in the national procedure for an equivalent and effective enforcement of the EU law. The national authorities are responsible for complying with these principles.

The national courts and authorities cannot apply another procedural rule when enforcing the EU law, but rather – speaking metaphorically – have to put on another pair of glasses, which can help to use the national law in specified aspects. Through one lense of these glasses, the national judges have to pay attention to the equivalent criteria: the procedural rules for the enforcement of the EU law have to be equivalent with those governing the enforcement of national law. Therefore, they cannot be less favourable than those which govern similar domestic actions. With the other lens, they have to pay attention to the principle of effectiveness, which requires that the national rules do not render practically impossible or excessively difficult the exercise of the rights conferred by EU law.

In my view, the European Union has legislative competence for the enforcement of the rules of EU law, however in this field the harmonization has only been sectoral up to now. Therefore, the national law should be applicable to those issues which are not covered by EU law. When the national law is applicable to the enforcement of a claim under the EU-law, the above-mentioned principles must be respected.

The dissertation provides a theoretical view of the practice of the principle of equivalence and effectiveness. In respect of the equivalence criteria I will examine – among others – the way two procedural provisions could be equivalent. What can be compared and by which criteria should the matter be evaluated? What makes a procedural rule less favourable? The principle of effectiveness also needs more evaluation: what makes the enforcement of EU law impossible in practice and excessively difficult? What kind of – subjective and objective – criteria should be examined to assess the issue? What is the role of the national judge in this matter? Are there any limits to the enforcement of EU law, and if so, what are they?

In the domestic and the international legal literature, there is already a debate in itself between scholars about the question of whether the EU law can determine the framework of national procedural law, and if there is procedural autonomy for the Member States or not. How

do these principles fit into the EU's judicial protection system? What is the basis in the primary EU legislation?

There is more than 40 years of legal practice of the CJEU regarding these questions which dates back to the *Rewe*[1] and *Comet*[2] decisions in 1976. Almost every civil and administrative procedural instrument and remedy has been the subject of the preliminary rulings by CJEU.

Undoubtedly, it seems inviting to examine all parts of the civil procedure in this matter. For example, it seems to be interesting to go through the CJEU decisions which examined the national rules of standing, the procedure of the first instance or procedure of appeal; which preliminary rulings questioned the parties'rights and obligations, or the limits of the legal review. Also, to examine how this decision should be applicable in the framework of the Hungarian law of civil procedure. The exhaustive list of these decisions exceed the limits of the current doctoral dissertation. Moreover, the CJEU decisions about the different Member States' procedural provision are not necessarily applicable in the system of the Hungarian civil procedure. It is more necessary and justified to understand the relationship between the EU law and the national procedural law: what logical steps and criteria should be used for deciding the compatibility of the domestic procedural provision with the EU-law. In order to answer these questions in 2020, we should know and understand how the CJEU practice has developed in this field during the last 40 years. It is striking that the wording of the principle of equivalence and effectiveness has changed to a negligible extent since the first decision. However, every scholar agrees with the fact that the content and the effects of these principles follow diverging trends in different periods.

[1] Case C-33/76, Rewe, ECLI:EU:C:1976:188.
[2] Case C-45/76, Comet, ECLI:EU:C:1976:191.

II. The structure of the dissertation

To provide a general overview of the development of the principle of equivalence and effectiveness, in the first part of the dissertation I examine the practice of the CJEU in three periods. These periods represent three different approaches, as well. As we will see when looking through the periods, the CJEU approach has been affected by multipolar factors: the number of cases has grown which shows the domestic procedural limits of the EU law enforcement. Moreover, the integration development, the economic changes also have well-marked impacts on the rulings of the CJEU. The analysis of the first two periods also give an opportunity to take an overview of the formation and development of a few remedial instruments, which establish the legal basis of the individuals' rights for compensation against the Member States. Among others, the following questions were raised in these periods: may the member states rely on an individual's delay in initiating proceedings in cases when these Member States have incorrectly transposed a directive into national law? What kind of liability have the Member States for the violation of the EU law? Could the limits of the interim relief hamper the effective enforcement of EU law? When should the EU law be applied by ex officio?

Hungary joined the European Union during the third period, thus, when analysing the CJEU practice beyond 2004, I would like to highlight those cases which had significant impact on the Hungarian civil procedural law and judicial practice. In this chapter I will analyse two major issues. First, I discuss the question whether, within the framework of Hungarian law, it is possible to reopen a finally closed case with reference to a later decision of the CJEU. Second, I focus on the procedural questions of the enforcement of the consumer rights, in particular the problems in Hungarian case law. My aim with the presentation of the CJEU case-law's development by the periods was also to highlight the relevance of these principles: how these have become unavoidable points of reference to decide the relationship between the EU-law and the national procedural law.

In the second part of the dissertation I discuss today's developed system of the principle of equivalence and effectiveness. My hypothesis is that during the three periods the aspects developed by the CJEU' case law generate a coherent system which make it possible to examine any domestic procedural provision: do they ensure the enforcement of the EU law properly or not?

This analysis could be illustrated as a coherent progress, where one can move forward by answering consecutive questions. When analysing equivalence, it must first be examined whether there is a relevant *procedural* provision in EU law for this case or not, thereafter one

should analyse the comparability of the *substantive* rules in question. The third question actually focuses on whether the procedural rules designed to ensure the enforcement of EU law are less favourable than those governing similar domestic situations, or not. I will also examine the principle of effectiveness by three aspects First, I examine when do the national procedural rules render the exercise of rights conferred by the European Union legal order *impossible in practice* and secondly, when do they render it *excessively difficult*. The third aspect which should be take into consideration is whether the result of the above-mentioned examination meets the so-called „*procedural rule of reason*" criterion.

This analytical process has brought to light various practical difficulties, to which legal scholars proposed numerous solutions. By contrasting these arguments, I will strive to make a clear criterion in order to decide whether the enforcement of EU law is ensured or not.

In this field one of the most contentious issue is the notion of „procedural autonomy". Undoubtedly, this is a slightly unfortunate notion for the labelling of the relationship of EU law and national procedural law. Furthermore, the CJEU also started to use it in its decision. In the last chapter of the dissertation my aim was to answer the question whether the Member States have procedural autonomy or not?

Although the CJEU gives some applicable aspects for the decision about the equivalence, in most cases it refers back the assessment of the national court which has direct knowledge of the detailed procedural rules. The same is true for the principle of effectiveness.

During my work at the Supreme Court of Hungary, I had to examine these tasks in many cases, therefore the dissertation mainly follows the approach: how would a national judge solve this problem? The authors of the relevant literature also use this pragmatic approach because they are judges, advocates generals from the CJEU or judges from the higher courts of the Member States who wrote monographs and articles in this field.

III. The methodology and sources of research

The subject of my dissertation determines the possible methodology of the research. I used the 'black letter' (doctrinal) approach for the definition and the separation of the notions of the EU law and the Hungarian law (which mostly have the same name in two legal systems). I have analysed whether the CJEU has created a common conceptual structure with respect to these two principles which is clearly applicable and interpretable for the Hungarian civil procedural law and legal practice. During this analysis I encountered the difficulty already identified by the legal scholars – , namely that the EU-law does not have a common, autonomous theoretical background.[3] The discussion about EU law, and EU scholarship are still defined today by thematic issues, for example the effect of EU law on the national legal systems and the law developing mechanism of EU law. Taking into account these specialties and limits of the methodology, I will describe the content and effects of the principle of equivalence and effectiveness primarily by examining the relevant case law of the CJEU and the national courts. To justify my findings, I refer to almost two hundred CJEU decisions, of which the leading cases are also described in sufficient depth by analysing the relevant international literature. A significant part of the selected sources focuses on the civil procedural law of the member states, and they do not cover the relevant case law of CJEU in the field of administrative or criminal procedural law due to the differences between the different branches of the law. In the first part of the dissertation I used mainly the classification devised by *Michael Dougan*, *Takis Tridimas* and *Diana-Urania Galetta* to present the changes in the CJEU's practice.

In the second part of the dissertation I seek to promote the systematic structure of the principle of equivalence and effectiveness: how should a domestic procedural rule be examined if it is used for the enforcement EU law. This process presumes the consistency of the CJEU practice. To reinforce the examination aspects I focused on the case-law of CJEU and not only particular judgment. Furthermore, it is important, that not every type of procedure or case fits into this system due to the special circumstances of the cases. For the analysis of the practical applicability of these principles my research is based on the views of *Michael Bobek*, *Sacha Prechal* and *Constantin Kakouris*.

[3] VARJU Márton: Az európai jog tudománya Magyarországon. In: JAKAB András – MENYHÁRD Attila: *A jog tudománya*. HVG-ORAC, Budapest, 2015. 355-356.

IV. Summary of the findings

The European Union is unique and special considering the fact that it has been able to establish a complex and coherent system. EU law is also enforced by domestic courts, as opposed to international organizations where the enforcement is less ensured.

The judicial protection system is complete, due to the fact that the institutional preconditions are provided both at EU and the domestic level. This system is coherent because both direct and the indirect enforcement is possible before the Members States' courts, and the review of the decisions of the EU institutions is possible through procedures before CJEU.

The judicial protection system of the EU is unclear and unpredictable. The system is not clear because the enforcement of the right ensured by the EU legal order is mostly exercised within the procedural rules and institutional frameworks provided by the Member States. Despite the fact that there are some overlaps between national legal systems, the enforcement of EU law is guaranteed by very different conditions and to a very different extent. The differences of the national legal system maintain the possibility of the enforcement of EU law in 27 different ways. This situation implies that there is an unequal judicial protection for individuals in the EU. However, I believe that the historical development of the principle of equivalence and effectiveness shows that the proper enforcement of EU law is not impeded by the differences of the member states' legal systems, but rather by their quality, inflexibility and inconsistency.

1. Findings from the historical development

The first phase was the period from 1976 to 1990 when the CJEU laid down the theoretical basis for the examination of the Member States' procedural law: the principle of equivalence and effectiveness. However, in this period the CJEU's approach remained reluctant, and the examined domestic rules of the Member States were found to be adequate with a few exceptions. It was a significant step forward and his has fundamentally defined subsequent case-law, when the principle of effectiveness was supplemented by a need to examine the national rules whether they make the exercise of the EU rights excessively difficult. I do agree with *Michael Dougan*, who claims that this supplement is the renewal of the principle of effectiveness and gives a significant opportunity to interfere with the national civil procedure law. [4]

The period of the case-law from 1990 to 2004 was influenced more by the integration factor. Of these, the Treaty of Maastricht and the greatest enlargement of the EU in 2004 should be highlighted. The significant number of the adopted directives[5] also increased the number of those cases which focused on damages derived from the failed or incorrect transposition. During the second period, the CJEU approach has changed in principle: the CJEU has set up a more positive obligation for the national rules instead of the non-discriminative application of the national rules. In the absence of EU legislation, the CJEU has established the principle of the member state liability in this matter for the breach of the EU law. In addition to other significant decisions, this can be considered the most interventionist decision, which had a huge effect on the Member States' legal systems, including the development of the individuals' judicial protection. From the case-law analysis we have to mention that the approach of the CJEU was very unsteady, which can be confirmed with a few critical opinions: the CJEU many times tried to strike a balance between the members states' autonomy and the effectiveness of the EU law inconsistently.

The intention to bring the EU closer to citizens resulted in development that the CJEU was faced with problems of the enforcement of individuals social rights beside of the large companies' interests. Also due to the economic crisis, this culminated in the third period in the consumer cases. It is not exaggeration to say that these cases represent the greatest challenge

[4] DOUGAN, Michael: The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts. In: Paul CRAIG – Gráinne DE BÚRCA (szerk.): *The Evolution of EU Law*. Oxford University Press, Oxford, 2011. 413.
[5] From 1987 to 1992 174 directives has been adopted by the EU legislators.

for the Hungarian courts: what is court's duty with respect to the protection of the consumers' rights, and how could these rights be enforced in a civil procedure. The imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The obligation of the national court in this matter to examine ex officio any unfairness of a contractual term under Directive 93/13 scope. compensate for that imbalance between the parties. The ex officio application is possible only if it has the necessary legal and factual elements for that purpose. The last condition means that only those clauses should be examined by the court which were disputed in the action. There is no obligation for the national court to examine ex officio the entire contract in the absence of a claim to that effect. This finding also follows from the application of the principle of rule of reason, the requirement of the effective enforcement the EU consumer law does not breach the principle that the parties have the right to delimit the subject matter of an action. I do agree with the *Beka*'s approach, who considered: „the consumer proceedings do not become inquisitorial. The requirement to observe the factual ambit of the dispute is the "borderline" which the courts cannot cross." [6]

According to the consistent case-law of the CJEU the EU law does not impose an obligation on Member States to create new remedies to ensure the observance of the EU law other than those already laid down by national law. In general there is no obligation to reopen final judicial decision to ensure the effective enforcement of the EU law or the CJEU decision. However if the national law does provide possibility to reopen a case the principle of equivalence would require that it should be applicable to EU law as well.

The Hungarian Code of Civil Procedure section 393 point *a)* makes the retrial of a case referring for a final court or other official decision possible. However these rules on retrial are not applicable to CJEU decisions. There is a consistent judicial practice about the question that the reason for retrial under point *a)* only aims to take into account new factual elements. The CJEU' preliminary rulings – even it's about the interpretation or the validity of the EU law – in every case make decision about legal nor factual question, consequently it is not applicable as a reason for retrial under the Hungarian law. Under the Hungarian law there is possibility to retrial a case on the basis of the violation of a fundamental right or the infringement of the

[6] BEKA, Anthi: *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion*. Intersentia, Cambridge, 2018. 198.

European Convention for the Protection of Human Rights and Fundamental Freedoms, however these remedies have a relative personal scope, only the applicant of the constitutional complaint or the applicant in his own case after the European Court of Human Rights' decision can submit a motion for retrial. The same is true for the party concerned with the preliminary ruling, so the Hungarian rules for the retrial are not contrary to the principle of equivalence.

By overview of the periodic divided case-law of the CJEU it can be stated that the despite the mantra style repetition of the principle of equivalence and the principle of effectiveness theirs effects and applications resulted in different outcomes from time to time. It has strengthened by different aspects that the EU law effect on the civil procedural law is the reflection of the integration development.

2. Findings according to the principle of equivalent

The European Union has competence to set up an own procedural system for the enforcement of the EU-law, until this happens – as long as the EU law is absent – the national law should be applicable. When enforcing the EU law, it should first of all be examined whether there is an EU procedural provision for the matter or not. It should be taken into account that the sectoral legislation of the EU by the directives is not limited to the cross-border situations it has procedural provisions for the purely domestic claims too.

For the decision about the equivalence two main questions should be examined: the comparability of the national law, and subsequently the less favourable aspects.

For the examination of the comparability it is important that we should compare a national and an EU-based substantive provision. Two types of application based on EU law invoking the principle of equivalence is irrelevant. The second condition for the comparability is that similar action of the same nature and falling in the same branches of the law should be compared. The principle of equivalence requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally, the proceedings with different nature and falling different branch of the law should not examine.

The less favourable aspect of a procedural rule needs a complex analysis therefore it is not sufficient to examine only one feature while ignoring of the other possible advantages of the procedure. While at first sight a procedural rule may seem to be less favourable it should examined if from another aspect it does not result in such advantages, which compensate for the disadvantages. That principle is not to be interpreted as requiring Member States to extend their most favourable rules to all similar claim.

For the enforcement of the EU law the biggest obstacle is not the differences of the Member States' procedural rules but their quality. It is entirely clear that if the enforcement rules of two comparable substantive rights – whether based on EU law or not – are different and considering all detailed aspects less favourable, than this situation calls the coherence of the legal system in doubt. The legal system which violates the principle of the equivalence is already inconsistent. The CJEU has answered many questions which if were examined by constitutional aspects under the national law they would found also infringement.

3. Findings according to the principle of effectiveness

A comparative analysis covering since the entry into force of the Lisbon Treaty the requirement and content of the effective judicial protection and the principle of effectiveness has the same object. The „*excessively difficult*" aspect is the main pillar of the principle of effectiveness. By the historical overview of the case-law it can be stated that every landmark decision of the CJEU is based on this aspect. It involves – among others – the principle of proportionality and enhances the practical application of the effective judicial protection in the civil procedure. The substantive rights also have effect on the applicable procedural law. The procedural law should adjust to the substantive law. Every procedural code should ensure this flexibility. The inverse situation is not possible.

The excessively difficult aspect is the most subjective within the two principles' examination. The national judge have to analyse by reference to the role of questioned provision in the procedure, this principle require an examination of all circumstances of fact and law.

The time limits, cost of the proceedings, the geographical distance to court caused by the rules of the jurisdiction and competence, the mandatory legal representation, or the extreme formalities they are requirement which could make excessively difficult to exercise of the rights conferred by the EU-law. The legal certainty, requirement of legal protection or professional representation for individuals, requirement of the sustainability of the civil justice, rules for the specialisation of the judges – these provisions are part of all legal system. Therefore they should not be dismissed for the simple reason that they excessively hamper the application of the EU law. The principle of effectiveness is a questionable requirement by the basic principle of the domestic judicial system. That is what we call the examination of „rule of reason". This ensure protection against an interpretation which is contrary to the basic principle of the civil procedure. The principle of effectiveness requires only that national procedural rules must not make it excessively difficult to exercise of EU-law. In particular, it does not require the exercise of those rights to be easier, cheaper, faster or more effective than the national law.

In my view the examination of these principles shows the truth of the hypothesis formulated in the introduction: aspects developed by the CJEU's case law generate a coherent system. This examination is applicable to rule out the insufficiency of the national legal system, and to protect the EU law from the discriminatory national rules and from those which make impossible in practice to enforce it. This legal tool is coherent and applicable in the practice,

however it is far from being perfect at the Member States' level: in certain cases to reach the final conclusion still remains a major challenge. If the structured test result is not sufficient or entirely clear the finally court should refer a preliminary ruling, in so far – as he did in the last 40 years – the CJEU can effort a useful and adequate answer for the difficulties with the enforcement of the EU law in the Member States.

The „*principle of the Member States autonomy*" is a wrong and misleading notion to describe what impact EU law could have on the national procedural law. The requirement of the principle of equivalence and effectiveness implicitly involves that the Member States legal system is not free from reviewing by the CJEU. From the number of divisive legal literatures I mostly agree with *Bobek's* approach, who considers that in accordance with the enforcement of the EU law there is no area in which the Member States are free from any constraints. The EU legislation in the field of the procedural law is limited, assigned and area-specific. By contrast, the CJEU's interpretation is limitless: it can examine every national provision which connected to the EU law enforcement in preliminary ruling proceedings. Every part and provision of the civil procedure could be examined from the aspects of the principle of equivalence and effectiveness. The Member States have procedural autonomy until one of their judges asks about it from the CJEU.

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